

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LISA H.-A.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C20-5524-BAT

**ORDER AFFIRMING THE
COMMISSIONER’S DECISION**

Plaintiff seeks review of the denial of her application for Disability Insurance Benefits. Plaintiff contends the ALJ erred by (1) finding she can perform past work, although a prior ALJ decision found she could not; (2) relying on vocational expert (“VE”) testimony that conflicts with the Dictionary of Occupational Titles (“DOT”); (3) entering findings at steps three and four and crafting a residual functional capacity (“RFC”) assessment that fail to account for all of her limitations; and (4) failing to account for Plaintiff’s amendment of the alleged onset date. Dkt. 20 at 1. As discussed below, the Court **AFFIRMS** the Commissioner’s final decision and **DISMISSES** the case with prejudice.

BACKGROUND

Plaintiff is currently 58 years old, has a bachelor’s degree and training as a pharmacy technician, and her previous jobs include pharmacy technician. Tr. 60-61, 219. In April 2014,

1 she applied for benefits, alleging disability as of October 10, 2013. Tr. 191-94. Her application
 2 was denied initially and on reconsideration. Tr. 123-29, 131-35. At an administrative hearing,
 3 Plaintiff amended her alleged onset date to August 10, 2014. Tr. 689. The ALJ conducted
 4 hearings in September 2015 and January 2016 (Tr. 47-97), and subsequently found Plaintiff not
 5 disabled. Tr. 31-41. The Appeals Council denied Plaintiff's request for review (Tr. 1-6), and
 6 Plaintiff appealed to this court, which reversed the ALJ's decision and remanded for further
 7 administrative proceedings. Tr. 751-62. After remand hearings (Tr. 680-725), a different ALJ
 8 subsequently found Plaintiff not disabled. Tr. 653-71. Plaintiff now seeks judicial review of the
 9 ALJ's decision.

10 THE ALJ'S DECISION

11 Utilizing the five-step disability evaluation process,¹ the ALJ found:

12 **Step one:** Plaintiff did not engage in substantial gainful activity between her original
 13 alleged onset date and her date last insured ("DLI") of December 31, 2018.

14 **Step two:** Through the DLI, Plaintiff had the following severe impairments:
 affective/bipolar disorder and degenerative disc disease.

15 **Step three:** These impairments did not meet or equal the requirements of a listed
 16 impairment.²

17 **RFC:** Through the DLI, Plaintiff could perform light work with additional limitations:
 18 she could occasionally reach overhead. She could understand, remember, and carry out
 19 instructions and tasks of occupations with a specific vocational preparation level of 1-3.
 She could have occasional interaction with co-workers and supervisors, and infrequent
 and superficial interaction with the general public.

20 **Step four:** Plaintiff could perform her past work as a pharmacy technician.

21 Tr. 653-71.

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 23 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

DISCUSSION

A. Alleged Onset Date

Plaintiff amended her alleged onset date to August 10, 2014, at an administrative hearing. *See* Tr. 689. The ALJ acknowledged this amendment early in the decision (Tr. 654), but then adjudicated the period running from her original alleged onset date (October 10, 2013) through the DLI of December 31, 2018. *See* Tr. 671. Plaintiff bears the burden of establishing the ALJ harmfully erred and has failed to do so here. There is nothing showing the ALJ excluded evidence relevant to Plaintiff's amended onset date by utilizing a mistaken onset date. Although Plaintiff suggests the ALJ erred in relying on evidence from 2013, she has not shown that the 2013 evidence is wholly irrelevant to an understanding of Plaintiff's functioning since August 10, 2014 the alleged onset date. *See* Dkt. 20 at 17-18. While medical evidence that predate the alleged onset date is of limited value, *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir.2008), "[t]he ALJ must consider all medical opinion evidence" and that can include evidence before the onset date. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir.2008). Because the ALJ's decision discusses the evidence that post-dates Plaintiff's amended alleged onset date as well, and does not give undue weight to the 2013 evidence, *see* Tr. 656-70, the Court finds Plaintiff has failed to meet her burden to show harmful error flowing from the ALJ's failure to account for Plaintiff's amendment of her alleged onset date.

B. Residual Functional Capacity

Plaintiff argues the ALJ erred in failing to account for her neck impairment, back impairment, hand paresthesia, migraines, and mental impairments at step three and in the RFC assessment. Dkt. 20 at 5-17. Here argument also raises challenges to the ALJ's assessment of Plaintiff's testimony as well as various medical opinions.

1 ***1. Neck and back impairments***

2 Plaintiff argues various reports and treatment notes mention pain and numbness resulting
3 from her neck and back impairments. Dkt. 20 at 5-6. She contends the ALJ “fails to include”
4 her hand/finger numbness and tingling “for impermissible reasons, and erroneously concludes
5 the Plaintiff ‘does not have’ a bilateral upper extremity impairment affecting fine and gross
6 motor manipulations at step three.” Dkt. 20 at 6 (quoting Tr. 658). Plaintiff also argues her
7 spinal impairments are worse than the ALJ found. Dkt. 20 at 6-8.

8 The ALJ found Plaintiff’s degenerative disc disease was a severe impairment at step two
9 (Tr. 656), but found at step three the impairment did not meet or equal a listing because the
10 record did not contain evidence satisfying all of the criteria of Listing 1.02 or 1.04, specifically
11 nerve root impingement or compromised spinal cord, or the inability to effectively perform fine
12 and gross motor manipulations. Tr. 658.

13 Plaintiff disputes the record fails to corroborate nerve root impingement or compromised
14 spinal cord, contending that findings of “severe foraminal stenosis” mean the same thing. Dkt.
15 20 at 7. But the ALJ acknowledged Plaintiff’s severe bilateral foraminal stenosis (Tr. 658), and
16 even if the ALJ could or should have found that this finding was equivalent to nerve root
17 impingement or compromised spinal cord, there are other elements of Listing 1.04 (including
18 neuroanatomic distribution of pain, limitation of motion of the spine, motor loss accompanied by
19 sensory or reflex loss, and positive straight leg-raising both sitting and supine) that Plaintiff does
20 not show she satisfies. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04. Thus, Plaintiff fails to
21 establish the ALJ erred in finding she did not meet or equal Listing 1.04.

22 Likewise, Plaintiff has not shown the ALJ erred in finding she did not meet or equal
23 Listing 1.02. Plaintiff points to various places in the record where she alleged hand/finger

1 numbness (Dkt. 20 at 5-8), but does not show or argue these reports or findings are equivalent to
2 a finding that Plaintiff has lost the ability to effectively perform gross and fine movements, as
3 required by Listing 1.02. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.02. As such, Plaintiff has
4 not established the ALJ erred in finding that she did not meet or equal Listing 1.02.

5 To the extent Plaintiff also argues the ALJ erred in failing to include any RFC limitations
6 resulting from her hand/finger numbness or back pain (Dkt. 20 at 8-11), the ALJ discussed
7 Plaintiff's allegations of disabling limitations in this regard and explained he found her
8 allegations to be inconsistent with her own statements in her agency paperwork (denying
9 physical limitations in May 2014 (Tr. 253)) along with the many normal findings as to
10 functionality in the medical record. Tr. 661-63. Although Plaintiff contends she did not know at
11 the time she completed her paperwork she was required to list every symptom (Dkt. 20 at 10),
12 and that she continued to report symptoms to providers throughout the adjudicated period,
13 Plaintiff fails to establish the ALJ erred in relying on inconsistencies between her allegations and
14 her own statements as well as the many normal findings of providers to discount Plaintiff's
15 allegations of disabling physical limitations pertaining to her degenerative disc disease. *See*
16 *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (ALJ may consider a claimant's
17 inconsistent or non-existent reporting of symptoms); *Carmickle v. Comm'r of Social Sec. Admin.*,
18 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical record is a sufficient basis
19 for rejecting the claimant's subjective testimony.").

20 The Court declines to reweigh the evidence in Plaintiff's favor and finds Plaintiff has not
21 met her burden to show the ALJ harmfully erred in assessing her back and neck impairments.
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1 **2. *Migraines***

2 The ALJ found Plaintiff's migraines were not a severe impairment at step two because
3 Plaintiff's allegations of migraine frequency and severity were contradicted by the record and the
4 record also showed medication was effective in treating the migraines. Tr. 656-57. The ALJ
5 also found that even if migraines were considered a severe impairment at step two, the record did
6 not establish greater limitations caused by migraines than the ALJ included in the RFC
7 assessment. Tr. 657.

8 Plaintiff contends the ALJ relied on a single treatment note to discount the severity of her
9 migraines (Dkt. 20 at 11), but this argument mischaracterizes the content of the ALJ's decision.
10 See Tr. 656-57 (summarizing multiple treatment notes spanning years). Furthermore, Plaintiff
11 has not shown the evidence established the existence of any limitation caused by her migraines,
12 which the ALJ should have included in the RFC assessment. The ALJ discussed Plaintiff's
13 allegations and explained why he discounted them, and Plaintiff has not shown these reasons are
14 erroneous. See Tr. 656-57. Because the ALJ properly considered Plaintiff's alleged limitations
15 caused by her migraines, any error in the ALJ's failure to include migraines at step two would be
16 harmless. See *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017).

17 **3. *Mental impairments***

18 Lastly, Plaintiff argues the ALJ erred in discounting her allegations as to her mental
19 limitations. In finding Plaintiff's mental limitations were less severe than she alleged, the ALJ
20 pointed to (1) normal mental status examinations, (2) treatment notes documenting minimal
21 psychiatric symptoms, and (3) serious symptom flares occurring in the context of lack of
22 compliance with medications or acute stress related to a death in the family. Tr. 664-66. The
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1 ALJ also discounted certain opinion evidence and lay statements describing mental limitations
2 inconsistent with the record. Tr. 666-70.

3 Plaintiff contends the record should be interpreted to support her allegations rather than
4 discount them (Dkt. 20 at 14-17), but the argument rests on an alternative interpretation of the
5 record rather than establishing error in the ALJ's decision. For example, Plaintiff disagrees that
6 her symptom exacerbation is linked to lack of medication and/or situational stressors, contending
7 the record shows exacerbations "happen whether on or off medication." Dkt. 10 at 14 (citing Tr.
8 995-1008, 1015-18, 1087-88, 1138-39.) Plaintiff does not show she was hospitalized for
9 psychiatric symptoms at a time that she was compliant with medications, however, and thus does
10 not show the ALJ erred in finding a link between her hospitalizations and her lack of compliance
11 with medications. Tr. 665-66. Further the ALJ did not find medications resolved all of
12 Plaintiff's mental symptoms, and instead included significant mental restrictions in the RFC
13 assessment. *See* Tr. 660. Thus, Plaintiff's identification of treatment notes mentioning the
14 existence or report of symptoms even while medication-compliant does not demonstrate the ALJ
15 harmfully erred.

16 Additionally, although Plaintiff argues the ALJ erred in relying on her lack of medication
17 compliance as a reason to discount her allegations without considering why she failed to comply
18 (Dkt. 20 at 14-15), the ALJ in fact discussed the evidence pertaining to Plaintiff's lack of
19 compliance at length, and concluded that her lack of compliance was volitional rather than
20 caused by her mental impairments. Tr. 665-66. Plaintiff has not shown the ALJ erred in these
21 findings.

22 Plaintiff further challenges the ALJ's assessment of the medical opinions and lay
23 statements, arguing the ALJ erred in relying on one treatment note as evidence Plaintiff

1 maintained a normal presentation during that appointment, when many other appointments
2 document abnormal symptoms. Dkt. 20 at 15-17. The argument overlooks the other reasons the
3 ALJ discounted the opinion and lay statements, specifically the normal mental status
4 examinations, the many normal findings contained in multiple treatment notes, and Plaintiff's
5 improvement when compliant with medication. Tr. 668-70. The ALJ thus did not impermissibly
6 rely on one treatment note out of context, as Plaintiff contends.

7 To the extent Plaintiff argues the ALJ relied on reasons previously rejected in a court
8 remand order to discount the opinion of examining psychiatrist Kathleen Andersen, M.D.,
9 Plaintiff overlooks the ALJ's explanation in the current decision. The court remand order
10 suggested that a one-time examination report cannot be discounted simply as based on a one-
11 time examination, particularly because Dr. Andersen reviewed Plaintiff's records. *See* Tr. 759.
12 But the ALJ explained in the current decision that Plaintiff's presentation during Dr. Andersen's
13 evaluation was "drastically different" than her presentation during appointments throughout the
14 relevant period, and emphasized that Dr. Andersen herself highlighted her limited perspective on
15 Plaintiff's functioning. Tr. 668-69 (referencing Tr. 465 ("I interacted briefly with [Plaintiff]."),
16 475 ("Because of [Plaintiff's] mental state, I was not able to carry out the interview. However, I
17 was asked to provide what information I have about my brief interaction with her."), 480 ("My
18 interactions with her were brief, and it would be difficult to draw diagnostic conclusions.")). The
19 ALJ adequately explained why Dr. Andersen's limited perspective, in conjunction with
20 contrasting treatment notes from throughout the adjudicated period, undermined the reliability of
21 her conclusions. Tr. 668-69. Plaintiff has not shown the ALJ merely reiterated reasoning
22 already rejected in a prior court remand order, or shown the ALJ's reasoning in the current
23 decision was erroneous. *See* 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6) (providing that in

1 considering the weight to afford a medical opinion, an ALJ may consider the extent to which a
2 medical source is familiar with the other information in a claimant's record).

3 Plaintiff broadly states the ALJ failed to provide legally sufficient reasons to discount
4 other opinions and lay statements (Dkt. 20 at 16-17), but does not address the ALJ's reasons or
5 explain why they are insufficient. *See* Tr. 668-70. Accordingly, the Court finds that Plaintiff has
6 failed to meet her burden to show harmful legal error in the ALJ's decision with respect to this
7 evidence.

8 **C. Past Relevant Work**

9 In the prior decision, the ALJ found considering Plaintiff's RFC, she could not perform
10 her past work. *See* Tr. 40. That decision was reversed and vacated, and in the current decision,
11 which contains a similar but not identical RFC assessment, the ALJ relied on VE testimony to
12 find Plaintiff can perform her past work as a pharmacy technician. Tr. 670-71.

13 Plaintiff argues the ALJ erred in the current decision in failing to give *res judicata* effect
14 to the RFC assessment and step-four finding contained in the prior decision. Dkt. 20 at 2-3.
15 This argument is unfounded because the prior ALJ decision was reversed and vacated, and the
16 ALJ on remand held a new hearing and considered an expanded adjudicated period. These facts
17 distinguish this case from the cases cited by Plaintiff, which discuss *res judicata* in the context of
18 a prior administratively final ALJ decision. *See Chavez v. Bowen*, 844 F.2d 691, 692-93 (9th
19 Cir. 1988); *Drake v. Saul*, 805 Fed. Appx. 467 (9th Cir. Mar. 5, 2020). Plaintiff cites no
20 authority suggesting that an ALJ should give *res judicata* effect to a prior decision that has been
21 reversed and vacated, and the Court is not aware of any such authority.

1 **D. Vocational Expert Testimony**

2 Lastly, Plaintiff argues the ALJ erred in relying on VE testimony at step four without
3 resolving the conflicts between the testimony and the DOT. An ALJ has an affirmative
4 responsibility to inquire as to whether a VE's testimony is consistent with the DOT and, if there
5 is a conflict, determine whether the VE's explanation for such a conflict is reasonable. *Massachi*
6 *v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007).

7 At the hearing, the ALJ asked the VE whether a person limited to medium work with
8 occasional overhead reaching, with the ability to perform work with a specific vocational
9 preparation level of 3 or less, would be able to perform Plaintiff's past relevant work. Tr. 717.
10 The VE stated a person with that RFC could perform the job of pharmacy technician. *Id.* The
11 ALJ then added a restriction to occasional interaction with coworkers and supervisors, and
12 infrequent and superficial interaction with the general public. Tr. 718. The VE testified the
13 pharmacy technician job would still remain feasible. *See id.* In conclusion, the VE stated his
14 testimony was based on the DOT. Tr. 724.

15 Plaintiff notes the DOT defines the pharmacy technician job to require frequent reaching,
16 handling, and fingering, and suggests the DOT is therefore inconsistent with the ALJ's finding
17 that Plaintiff is restricted to occasional overhead reaching. Dkt. 20 at 4. But the DOT does not
18 explicitly state or suggest the pharmacy technician job requires frequent *overhead* reaching. *See*
19 DOT 074.382-010, *available at* 1991 WL 646728. In the absence of either a specific statement
20 in the DOT or a logical inference based on the DOT job description, Plaintiff has failed to
21 identify an obvious conflict between the VE testimony and the DOT as to the reaching
22 requirements of the pharmacy technician job. *See Gutierrez v. Colvin*, 844 F.3d 804, 808 (9th
23 Cir. 2016) (holding that although the DOT defined a job to require frequent reaching, a

1 restriction on *overhead* reaching is not necessarily implicated where the need to reach overhead
 2 is unlikely or unforeseeable in that particular job).

3 Plaintiff also argues the VE's testimony was inconsistent with the DOT because a
 4 pharmacy technician assists a pharmacist, and thus there is an implied conflict between the DOT
 5 and the social restrictions in the RFC assessment. The DOT does define the pharmacy technician
 6 job to require rendering assistance to a pharmacist in carrying out various duties, but it also
 7 defines the job to require a "not significant" degree of "taking instructions-helping". *See* DOT
 8 074.382-010, *available at* 1991 WL 646728. Furthermore, the VE was asked specifically about
 9 the social requirements of the pharmacy technician job and the VE explained that a person with
 10 Plaintiff's social restrictions could still perform the job, given its low "people" score. Tr. 719-
 11 21. Thus, again, Plaintiff has failed to identify an obvious conflict between the VE's testimony
 12 and the DOT, and has not shown that the ALJ erred in relying on the testimony in entering step-
 13 four findings.

14 The Court accordingly concludes Plaintiff fails to show the ALJ improperly relied on VE
 15 testimony that conflicts with the DOT at step four.

16 CONCLUSION

17 For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is
 18 **DISMISSED** with prejudice.

19 DATED this 9th day of February 2021.

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 BRIAN A. TSUCHIDA
 Chief United States Magistrate Judge